Van Vlerah Mechanical, Inc. *and* Plumbers and Steamfitters Local Union No. 166, a/w United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, AFL–CIO. Case 25–CA–22810

January 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The question presented here is whether Administrative Law Judge Jesse Kleiman correctly found that the Respondent committed several violations of Section 8(a)(1) of the Act and discharged an employee in violation of Section 8(a)(3) and (1) of the Act.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Van Vlerah Mechanical, Inc., Angola, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(e) and reletter the subsequent paragraph.

''(e) Discharging or otherwise disciplining employees because they refuse to abandon their support for the Union, or any other labor organization.''

2. Substitute the attached notice for that of the administrative law judge.

[1] On September 14, 1995, the judge issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions, a supporting brief, and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We find merit in the General Counsel's exceptions to the judge's failure to include certain remedial provisions in the recommended Order and notice relating to the unlawful discharge of employee Arden Reust. We shall modify the Order and substitute a new notice including these provisions.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union membership, activities, and sympathies.

WE WILL NOT promise our employees improved wages and benefits to reject the Union, or any other labor organization, as their bargaining representative.

WE WILL NOT solicit our employees to abandon their support for the Union or any other labor organization.

WE WILL NOT threaten our employees with discharge if they assist their Union in enforcing the collective-bargaining agreement.

WE WILL NOT discharge or otherwise discipline our employees because they refuse to abandon their support for the Union, or any other labor organization.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Arden Reust immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Arden Reust and notify him in writing that this has been done and that the discharge will not be used against him in any way.

VAN VLERAH MECHANICAL, INC.

Merrie Thompson, Esq., for the General Counsel.
Arthur E. Mandelbaum, Esq. (Miller, Carson, Boxberger & Murphy), for the Respondent.
Mark Richards, Business Manager for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge and amended charge filed on October 18, 1998, and January 31, 1994, respectively by Plumbers and Steamfitters Local Union No. 166, a/w United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, AFL–CIO (Plumbers Local 166), a complaint and notice of hearing was issued on January 31, 1994, against Van Vlerah Mechanical, Inc. (the Respondent), alleging that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On September 20, 1994, the complaint was amended to allege an additional violation of Section 8(a)(1) of the Act. The Respondent's answers denied the material allegations in the complaint and amended complaint.

A hearing was held before me on October 11 and 12, 1994, in Angola, Indiana. Subsequent to the closing of the hearing, the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material, is and has been a corporation with an office and place of business in Angola, Indiana, engaged in the building and construction industry as a mechanical contractor. The Respondent annually in the conduct of its business operations purchased and received at its Angola, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana. I, therefore, find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Plumbers and Steamfitters Local Union No. 166, a/w United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint and amendments thereto allege, in substance, that the Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully interrogating its employees about their union membership, activities, and sympathies and those of other employees, promised employees improved benefits and wages to reject the Union as their bargaining representative, solicited its employees to abandon their support for the Union, telephonically threatened its employees with discharge if they assisted the Union in enforcing the collective-bargaining agreement, and discharged employee Arden Reust because of his union activities. The Respondent denies these allegations.

A. *The Evidence*

The Respondent, a heating and air-conditioning contractor, performs work at various jobsites in Indiana and Ohio, employing plumbers, welders, and sheet metal workers. The Respondent is owned by its president, Karen Van Vlerah (51 percent) and James Van Vlerah Jr. (Van Vlerah) its vice president (49 percent). The Respondent is and has been a party to collective-bargaining agreements with three unions: the Union, as Charging Party (Plumbers Local 166) out of Fort Wayne, Indiana, whose jurisdiction lies within Indiana; United Association Local No. 50 Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Plumbers Local 50) out of Toledo, Ohio, whose jurisdiction is within Ohio; and Local No. 20 of the Sheet metal Workers International Association (Sheet metal Local 20) out of Fort Wayne, Indiana. The Respondent's employees are members of the above unions based on their trade and location. James Van Vlerah Jr. is a member of Plumbers Local 50.

As one of its work projects in September 1993, the Respondent was installing a heating and air-conditioning system in an existing high school and a new addition to the school in Pioneer, Ohio (the Pioneer Job). Since this jobsite was in Ohio, the territorial jurisdiction of Plumbers Local 50, and the Respondent is based in Indiana, the Respondent was utilizing plumbers on the jobsite from both Plumbers Local 166 and Plumbers Local 50. According to the testimony here, the Respondent believed that it had a verbal agreement with these two Plumbers Union locals allowing the Respondent to employ members of both these unions within each others territory where the nonavailability of workers necessitated this.

However, starting in August 1993, Bill Flowers, the business agent for Plumbers Local 50, started checking into the union membership of the Respondent's employees on the Pioneer Job. On or about September 2, 1993, while visiting the construction site, Flowers found that of the three employees on the job, Arden Reust, the working foreman, Hal DeTray and Bill Haines, Reust and Haines were members of Plumbers Local 166 and DeTray was a Plumbers Local 50 member. Flowers questioned Haines' right to work on the Pioneer Job and denied the existence of any agreement between the Respondent and Plumbers Locals 166 and 50 which would allow Plumbers Local 166 members to work at this jobsite. While allowing Haines to finish his work that day, Flowers warned Haines that he could not work on the Pioneer Job thereafter. Additionally, Flowers ordered DeTray to report to him any member of Plumbers Local 166 sent to work on the Pioneer Job and then Flowers left the site.

Reust now called Van Vlerah at the Respondent's shop and advised him as to what had occurred between Flowers and these employees. According to Reust, Van Vlerah then said, ''You tell Hal [DeTray] to keep his mouth shut. If there is any phone calls made, that he'll get his money and won't work for Van Vlerah Mechanical again.'' After Reust remarked that this was not right, Van Vlerah stated, ''It's not right . . . . I'm tired of getting it from the men, not wanting to do this job and not wanting to do that job. And I'm getting sick and tired of it. If it keeps up, I'm going to get rid of everybody and go hire guys off the street and get it done non-union.''

Reust told DeTray and Haines what Van Vlerah had said about DeTray being fired if he reported any Plumbers Local

166 members working on the Pioneer Job site to Flowers, and that Haines should not quit working on the jobsite nor be concerned about Flowers and Plumbers Local 50. The testimony of DeTray and Haines support that of Reust as to what Reust told them Van Vlerah had said concerning this incident. Moreover, Van Vlerah did not deny making any of the statements attributed to him, notwithstanding his being present throughout the hearing to assist the Respondent's counsel and having also testified here, although prior to their testimony.

Additionally, a problem had developed regarding the apprenticeship status of employee Pierre Jaquay, one of the first employees of Van Vlerah Mechanical, Inc. and a close personal friend of James Van Vlerah Jr. In September 1993, Jaquay was enrolled in the apprenticeship program requiring on-the-job-training (OJT). Evaluations of such training were to be reported to the Joint Apprenticeship Committee (JAC), which administered the program, on OJT cards or forms signed by Jaquay's supervisor. Leonard La Bundy, the JAC director of training, had discovered that Jaquay was signing his own evaluation forms, a possible violation of apprenticeship standards, and therefore he met with Jaquay on September 9, 1993, to discuss this matter. La Bundy testified that Jaquay explained that he was the only one who could sign his OJT cards because he was a superintendent and the other employees worked under him. It appears that Jaquay never related to Van Vlerah what he told La Bundy at his meeting.[1]

Be that as it may, on September 14, 1993, La Bundy received a telephone call from James Van Vlerah Jr. who ''forcefully'' inquired why JAC was ''trying to screw over'' Jaquay who was a fine apprentice. Van Vlerah said that the local union regularly sent him ''duds and crap,'' but La Bundy advised him to take that up with the union since JAC had nothing to do with the referral procedure. Also in this connection, Van Vlerah told La Bundy that ''if the contractors were going to screw over Pierre, that he would have to consider going non-union.'' La Bundy again told Van Vlerah that he would have to speak to the union about this.[2]

That same day, James Van Vlerah called Mark Richards, Plumbers Local 166 business manager, and discussed, among other things, the problem of Jaquay's apprenticeship status which could affect the Union's ability to refer him to the Respondent or any other employer for work. Richards testified that he and Van Vlerah had had prior conversations ''where [Van Vlerah] has entertained the idea of working non-union, that—what benefit does he get out of the union, and things of that nature, yes,'' but Richards acknowledged that Van Vlerah never indicated that he was taking steps to accomplish this.

The evidence here also shows that on September 16, 1993, another incident occurred involving Plumbers Local 50 Business Agent Flowers and a Plumbers Local 166 member employee of the Respondent on the Pioneer Job, an employee named Randy Morin. Flowers compelled Morin to leave the jobsite and admonished DeTray and Reust about Morin working there. When Morin returned to the shop and advised Van Vlerah as to what had occurred, Van Vlerah remarked that Flowers was exceeding his authority. It appears from the record that the Respondent was very unhappy about Flowers' ''harass[ing] our people.''

The Respondent makes payments to various union pension funds for employee union members, the National Pension Fund, the Pipe Trades, Plumbers Local 166 Pension Fund, the JAC Fund, and the Industry Fund. The record discloses that the total amount paid for just the Respondent's Plumbers Local 166 employees' benefits in 1993 from January through September of that year was $79,461.14. The Respondent also has pension fund costs for its Plumbers Local 50 employees who receive higher benefits then Plumbers Local 166 members, and Sheet Metal Workers Local 20 members whose benefits are lower.

On September 20, 1993, La Bundy sent a letter to Jaquay notifying him to appear before the Joint Apprenticeship Committee on September 28, 1993, regarding his apprenticeship status.

On or about Tuesday, September 21, 1993, Reust returned to the shop after work. He was in the fab shop alone when James Van Vlerah approached him and said that the Union was picking on Jaquay again, and remarked that the Respondent had just given the Union another $60,000 in benefit payments. Van Vlerah then asked Reust, ''What would you do if I offered you $80,000 to go non-union?'' Reust who makes about $45,000 per year, kind of laughed at that. Van Vlerah then said, ''No, stop and think about it. What has the Union ever done for you?'' Reust replied that the Union had gotten him a job when he needed one and that he would not be making the money he was making nor receive the benefits he was getting without the Union. Van Vlerah stated that he had talked to Mark Richards from Plumbers Local 166 and Dave La Plant, business manager for Plumbers Local 50, and that they had said the only thing the Unions had to offer was manpower and Reust responded that he did not believe that. Van Vlerah told Reust, ''If I didn't have to pay $60,000, I could take that, keep that, pay you $80,000, plus more benefits. You'd be happy and I'd be happy.'' Reust registered skepticism about this but Van Vlerah responded, ''I could do that, because all I need is two or three good men and I'd hire guys off the street, pay them less, and all you'd have to do is whip them. You'd make more money, I'd make more money, and we'd all be happy.'' Reust said that he did not see how this was possible and started to leave when Van Vlerah remarked, ''Well, it's going to happen. Not real soon, but I will go non-union.'' Reust again replied that this would not happen and then left the shop.[3]

The next day, Reust told some of the other employees at the Pioneer Job site what Van Vlerah had offered him. DeTray testified that Reust told him and two or three other employees about the $80,000 offer made to him by Van Vlerah to go nonunion plus benefits which DeTray thought ''just didn't really make sense to me.'' However, DeTray also stated that in his opinion, Reust ''really felt like [Van Vlerah] was serious about it.''

[1] On cross-examination, Jaquay's testimony concerning this appeard evasive and equivocal.

[2] Again, James Van Vlerah was not called to refute La Bundy's above testimony, even though he was present throughout the hearing. La Bundy also testified that he notifed Plumbers Local 166 business manager, Mark Richards, about Van Vlerah's remark concerning the Respondent going nonunion.

[3] As indicated here before, James Van Vlerah, although present throughout the hearing and having testified earlier, did not deny making these statements.

On September 28, 1993, Jaquay met with JAC and was questioned about his position and duties with the Respondent. While at first Jaquay testified that he had not told JAC why he did not have an employee other than himself sign his ''OJT cards,'' he did admit that he told JAC that he was a ''superintendent.'' No determination was made at this meeting regarding his apprenticeship status, but Jaquay testified that he was now left with the impression that there was a possibility that he could be dismissed from the apprenticeship program.

Thereafter, Jaquay's OJT cards were returned to the Respondent and were then signed by James Van Vlerah Jr. as Jaquay's supervisor and sent back to JAC. Jacquay reported to Van Vlerah what had transpired at the JAC meeting and Van Vlerah was very unhappy about this turn of events. On September 30, 1993, Van Vlerah faxed La Bundy a description of Jacquay's duties and position with the Respondent and in October 1993 JAC determined that Jaquay should be allowed to continue in the apprenticeship program.

The discharge of Arden Reust

Arden Reust commenced his employment with the Respondent in October 1987 as a plumber and steamfitter and was considered by James Van Vlerah Jr. to be a key employee, reliable, and a hard worker and that he did a good job 99 percent of the time on installations. Reust was granted the use of a company truck which he could drive home after work because of his good general attitude and performance. In May 1992 Reust was promoted to working foreman and was always paid a foreman's wage even when he was on jobs with less than three employees wherein the Respondent would not have been obligated to do so.[4] Prior to September 1993 and during the 6 years of his employment with the Respondent, Reust had never received any discipline whatsoever.

However, despite the above, James Van Vlerah testified that ''over the course of years,'' there were problems with Reust on jobs ''that are most likely not noteworthy of making written records of. Just piping practices that were wrong, piping of equipment that was wrong that was clearly shown on blueprints that were not followed. Things of that nature. Some, in general, poor judgment calls at times.''[5]

Sometime in early September 1993, the engine of the company truck that Reust was driving ''blew up.'' James Van Vlerah Jr. testified that Reust was responsible for this since the repair shop mechanics had told him that whoever drove the truck had driven ''it into the ground'' and deliberately abused the vehicle. However, in an affidavit given to a Board agent during the investigative stage of these proceedings, Van Vlerah had stated that while Reust had blown up the engine, the reason the mechanics believed it was deliberate was because the person driving the truck would have had to have heard the engine pounding and Van Vlerah explained to them that Reust had a severe hearing problem, which appears to me to imply that Van Vlerah did not feel that Reust was intentionally at fault. Moreover, Reust received no discipline regarding this incident.

After the Respondent's truck that Reust drove was disabled, Reust used his personal vehicle for work and filled its tank with gas from the Respondent's shop about once a week. This occurred in early September 1993 and Reust recorded on a sheet by the gas tank the quantity of gas taken and the vehicle being used. Reust testified that on one occasion when he had taken gas at the shop, Van Vlerah was nearby and observed him doing so without objection. Sometime in late September 1993, Van Vlerah approached Reust and told him that he could no longer use company gas in his personal vehicle. However, according to Reust, Van Vlerah had previously given him permission to use the Respondent's gas when he drove the company truck and was hauling material or equipment to and from a jobsite. Reust maintained that he had done this before and continued this practice in his personal vehicle when the company truck he drove was damaged. Additionally, when Van Vlerah was asked at the hearing if Reust had ever been verbally disciplined for using company property or materials, he responded, ''Not to my knowledge.'' Van Vlerah also acknowledged that over the course of Reust's employment he could have allowed him to take a tank of gas ''here and there'' in his personal vehicle for company use, but not on a regular routine basis.

Also, on September 16, 1993, safety inspectors from the Ohio Bureau of Workers' Compensation, Division of Safety & Hygiene visited the Pioneer Jobsite and advised Reust, the foreman on the job, that some acetylene tanks were laying about unsecured as required by safety regulations. Reust then secured these tanks upright while the inspectors were still there, and then notified Van Vlerah of this. Reust received no discipline for this incident even though the violation could have resulted in fines against the Respondent, and even though it was Reust's responsibility as working foreman to make sure safety measures were taken. On Van Vlerah's visit to the Pioneer Jobsite on September 24, 1993, he observed the same acetylene tanks lying unsecured. Van Vlerah pointed this out to Reust who said he would take care of it and then gave Reust a verbal warning about this.

As part of the Pioneer Job, the Respondent was required to complete a tie-in of an existing underground gasline to the newly constructed addition to the Pioneer school into which the heating system was being installed. In order to complete this tie-in, the gas to the existing building, where the school was in session, had to be shut off at 12:30 p.m. on September 29, 1993, and turned back on at 9:30 a.m. on September 30, 1993, the latter being necessary in order to comply with the Ohio State Code requiring heat and hot water availability while the school was open and students were in attendance. Reust, as working foreman on the Pioneer Job with responsibility for accomplishing the tie-in was made aware of the time and date scheduling requirements.

[4] Reust was a union steward approximately from 1990 through 1992.

[5] Van Vlerah specifically recalled; that Reust had wrongly piped a three-way valve in the boilerroom at the Steuben Community Center in 1991 or 1992; Reust refused to take a job in Wesona, Ohio, in 1990, which caused a reshuffling of employees and disruption of the work force on other projects; Reust did not want to work on a job in Freemont, Indiana, in 1991 or 1992 which resulted in a less experienced employee being assigned to perform the work; a year after Reust started working for the Respondent, Reust and another employee were at Bunde tubing in Ashley, Ohio, on an airline job and Reust failed to follow Van Vlerah's instructions regarding who was to perform which work thus requiring Van Vlerah to work on the site to finish the job on time as specified in the Respondent's bid.

On September 29, 1993, a rainy Wednesday, the gas was turned off at 12:30 p.m. as scheduled, and Reust and another welder made the tie-in. The gas pipe was welded at two spots and a chart recorder was hooked up to the gasline to test whether the tie-in was successfully completed without any leaks occurring. The gas company requires that this test run for 2 hours, at a steady 10 pounds of pressure, before the gas would be turned on and allowed to run through the new pipe. After the new pipe was installed, Reust turned on the chart recorder and since the pressure seemed to be holding steady he left the Pioneer Job site for home. James Van Vlerah Jr. called Reust while he was driving home and inquired about the status of the pipeline tie-in and Reust reported that it was ''fine, the test was on, and we'd know in the morning.''

The following morning, Thursday, September 30, 1993, Reust returned to the Pioneer Job site at 7 a.m. and discovered that the test pressure in the new line had dropped indicating a leak somewhere in the pipeline. Reust then proceeded to find the leak in the line by pumping the air pressure up. Although he found and repaired a leaking joint and then had DeTray fix a weld that was also leaking, still the test indicated the presence of a leak. Also finding that the gas company's meter had a bad compression fitting, he had the gas company install a new one and at about 2:40 p.m. when the test pressure appeared to be holding steady he left the Pioneer Job site at 3:30 p.m., his usual quitting time.

On his way home Reust stopped off at the Respondent's shop and finding Jaquay and some other employees present there, Reust gave Jaquay the defective meter fitting and explained that it had been leaking. While Jaquay denied that this occurred he acknowledged that he was present at the Respondent's facility during the afternoon of September 30, 1993. Reust also testified that he then went into Karen Van Vlerah's office and told her about the problem they were experiencing at the Pioneer Job site regarding the tie-in of the gas pipeline. Reust stated that Karen Van Vlerah said that she understood and Reust then left for home, Karen Van Vlerah denied that she ever had such a conversation with Reust.

On Friday morning, October 1, 1993, Reust and DeTray returned to the Pioneer Job site at 7 a.m. and found that the pressure had dropped in the pipeline. It was such a ''dramatic'' drop that it appeared to them that someone might have tampered with the chart recorder or the pipeline itself. Reust showed the chart to school superintendent, Charles Tank, who was present on the site and, after repeating the test, Tank told them to stay there and watch it for 2 hours to make sure nobody tampers with it. After about an hour and 15 minutes, the pressure dropped again and Reust advised the gas company representative who came to the site that there was something wrong with the chart recorder. The gas company obtained another recorder which was placed on the pipeline, this occurring about 11:00 a.m. that day.

According to Reust, at about the same time, around 11 a.m., the Respondent's sheet metal estimator, Tom Kirkwood, who had designed the heating and air-conditioning system and supervised its installation, ''mainly the sheetmetal, and some pipefitting work,'' arrived at the Pioneer Job site.[6] Reust explained the problem to Kirkwood, they put on a new test and Kirkwood suggested that they then go to lunch. On their return they discovered that the pressure had dropped again. Kirkwood and Reust cut the new part of the pipeline off from the old line, capped the old pipeline and found, after testing it, that the leak was apparently occurring in the old existing gas pipeline which was mostly buried underground.

After discussing this with Tank who told them that the school did not want to have to excavate the old pipeline to fix the leak and did not want the new line placed underground because of already buried telephone lines, data cables, etc., Kirkwood and Reust determined to run the new pipeline over the roof of the existing building, which would require additional material not then present on the jobsite. Since Tank also told them that they should do whatever it takes to get the gas line connected by the following Monday, Reust asked the Respondent's other employees on the site if they could come in on Saturday, October 2, 1993, to work on the pipeline, and Kirkwood called Karen Van Vlerah at the office to obtain the necessary materials needed and to be ordered.[7]

Reust then drove Kirkwood back to the shop whereupon Kirkwood and Jaquay left to return to the Pioneer Job to unload a delivery of gas pipe at the site arranged by Karen Van Vlerah. Meantime, Reust showed Karen Van Vlerah the recorder charts showing the drop in pressure indicating a gas leak. Karen Van Vlerah asked Reust if he wanted to work overtime that evening on a toll road job and Reust responded that since he would have to work overtime the next day (Saturday) on the Pioneer Job, he would pass this up. Reust then went home. On the way home Reust called Jaquay suggesting that they might need another welding machine at the Pioneer site for the next day. When Van Vlerah's voice came over the radio and stated that the job would have to be done with what they had at the site.

In the late afternoon of that Friday, James Van Vlerah Jr. appeared at the Pioneer Job site to see for himself what the problem was. When Kirkwood and Jaquay arrived at the site they found Van Vlerah upset and very angry. He started yelling at Kirkwood and Jaquay and asked why the gas pipeline had not been turned on and the heating system running and Kirkwood tried to explain about the pipeline leak and that Reust had been trying to locate it in order to repair it for the prior 2 days. Van Vlerah stated that if he had been apprised of the problem 2 days ago he could have come to the Pioneer Job and ''gotten it done properly.'' Kirkwood testified that later that evening Van Vlerah called him at home and apologized for being upset with him and told him that he had fired Reust.

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[6] While Kirkwood testified that he arrived at the Pioneer Job site at 1 or 1:30 p.m., and it was then that he first learned about the gas pipeline problem, Jaquay testified that Kirkwood had told James Van Vlerah Jr. later that day that he had found out about this problem at ''roughly, let's say, 11:00 o'clock.''

[7] Although James Van Vlerah testified that the employees were directed not to take orders from Tank, both Kirkwood and Reust seem to have done so, since Ed Kisten, the Pioneer school's representative overseeing the construction of the new school building was not available. Kirkwood testified that the believed Tank had authority to make some decisions.

Earlier that same evening, at about 6:45 p.m. James Van Vlerah Jr., who was then present on the Pioneer Job site, called Reust at home and told Reust that he should not come to work the next day, in fact not to come to work for the Respondent ever again. Reust asked Van Vlerah what he was talking about and Van Vlerah told him that Reust had ''let him down, I just can't depend on you anymore.'' Van Vlerah referred to the gasline not being operational when required and Reust asked if Karen Van Vlerah had told him about the problem they had been experiencing with the gas pipeline leak at the Pioneer Job and shown him the recorder chart evidencing this problem. After Van Vlerah denied being aware of the problem or having seen the ''fitting'' and the ''chart,'' Reust remarked that Karen Van Vlerah should have made him aware of the problem. Van Vlerah told Reust that they would discuss this on his return from vacation which was to start next week and Reust replied that he was going on vacation the week after that. However, no such conversation between Reust and Van Vlerah ever took place thereafter.

James Van Vlerah Jr. did not testify about this conversation with Reust. Instead, the Respondent offered the testimony of Jaquay who was positioned near Van Vlerah when he called Reust and overheard what Van Vlerah had said into the phone. According to Jaquay, Van Vlerah asked Reust what he had done for 2 days regarding the pipeline tie-in and then said, ''You watched a chart recorder for two days?'' and ''Why didn't you tell me?'' Van Vlerah told Reust not to appear at the Pioneer Job site on Saturday and then said that Reust did not have to return to work anymore at all. Van Vlerah ended the conversation by telling Reust that he was going on vacation the very next week.

The gas pipeline tie-in was completed on Saturday, October 2, 1993. The Respondent was required to pay its eight employees who worked that day on the Pioneer Job overtime and then based on the hours worked, double time. The Pioneer school board refused to pay the overtime and double time amounts since it took the position that the work required should have been performed and completed during regular working hours.

Additionally, according to the testimony of Karen Van Vlerah approximately one-third of the Respondent's work is derived from work done at the General Motors plant in Defiance, Ohio, under a contract requiring union laborers, aggregating approximately $1 million in income per year for the Respondent.

B. *Analysis and Conclusions*

The resolution of the issues presented in this case requires some determination as to the credibility of the respective witnesses here. After carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). I tend to credit the account of what occurred herein as given by the General Counsel's witnesses other than James Van Vlerah Jr. Their testimony was given in a forthright manner, and was generally corroborative and consistent with each others,[8] while that given by some of the Respondent's witnesses contained inconsistencies, was evasive at times and contradicted each others. However, this is not to say that I discredited all of the testimony of Van Vlerah and that of the Respondent's witnesses as will be more particularly set forth hereinafter.

The 8(a)(1) violations

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory right to engage in, or refrain from engaging in, concerted activity. This provision is modified, however, by Section 8(c) of the Act, which defines and implements the first amendment right of free speech in the context of labor relations. *NLRB v. Four Winds Industries*, 530 F.2d 75 (9th Cir. 1969). Section 8(c) permits employers to express ''any views, arguments or opinions'' concerning union representation without running afoul of Section 8(a)(1) of the Act if the expression ''contains no threat of reprisal or force or promise of benefit. *NLRB v. Marine World USA*, 611 F.2d 1274 (9th Cir. 1980); *NLRB v. Raytheon Co*., 445 F.2d 272 (9th Cir. 1971). The employer is also free to express opinions or make predictions, reasonably based in fact, about the possible effects of unionization on its company. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969). In determining whether questioned statements are permissible under Section 8(c), the statements must be considered in the context in which they were made and in view of the totality of the employer's conduct. *NLRB v. Marine World USA*, supra; *NLRB v. Lenkurt Electric Co*., 438 F.2d 1102 (9th Cir. 1971). Also recognized must be the economically dependent relationship of the employees to the employer and the necessary tendency of the former, because of the relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. *NLRB v. Gissel Packing Co*., supra at 617; *NLRB v. Marine World USA*, supra.

1. Threats

The amended complaint alleges that the Respondent telephonically threatened its employees with discharge if they assisted the Union in enforcing the collective-bargaining agreement in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

Reust credibly testified that when he called Van Vlerah on or about September 2, 1993, to inform him that Plumbers Local 50 Representative Flowers had instructed DeTray to report to his Union any Local 166 members working on the Pioneer School site, Van Vlerah told him to advise DeTray that if he did so he would be fired. The testimony of DeTray, Haines, and Morin tend to support Reust's version of this conversation. I therefore find and conclude that the Respondent thereby violated Section 8(a)(1) of the Act when Van Vlerah made the unlawful threat to fire DeTray since it tended to restrain and coerce employees in the exercise of their Section 7 rights. *Gold Shield Security*, 306 NLRB 20 (1992).

[8] Moreover, DeTray was still employed by the Respondent at the time of the hearing and his testimony, apparently adverse to the Respondent and corroborative of that of Reust is entitled to additional weight. *Shop-Rite Supermarket*, 231 NLRB 500 (1977).

2. Other alleged 8(a)(1) violations

The complaint herein alleges that the Respondent violated Section 8(a)(1) of the Act: by interrogating its employees about their union membership, activities, and sympathies and those of other employees; promised its employees that their benefits and wages would improve if the employees rejected the Union as their bargaining representative; and solicited its employees to abandon their support for the Union. The Respondent denies these allegations.

According to the testimony of Reust, which I credit, during a conversation between he and James Van Vlerah Jr. in the Respondent's shop in late September 1993, Van Vlerah offered Reust a substantial increase in salary and additional benefits if he, in effect, would abandon his support for the Union. When Reust laughed at the offer, Van Vlerah asked him what the Union had ever done for him and after Reust enumerated instances of the Union's support, Van Vlerah then renewed his offer to Reust to reject the Union and assist the Respondent in ridding itself of the Union.

In *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), the Board reiterated the basic test for evaluating whether interrogations violate Section 8(a)(1) of the Act established in *Blue Flash Express*, 109 NLRB 591 (1954); whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. The Board then stated in *Rossmore House*, supra at 117:

> Our view is consonant with that expressed by the Seventh Circuit, Court of Appeals in *Midwest Stock Exchange v. NLRB*, [635 F.2d 1255, 1267 (7th Cir. 1980)]:
>
> > It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of Section 8(a)(1) either the words themselves or the content in which they are used must suggest an element of coercion or interference.

Thus, the surrounding circumstances of the interrogation determines its unlawfulness and the Board will consider the time, place, personnel involved, and the known position of the employer, in making such a determination. *Teamsters Local 633 (Bulk Haulers) v. NLRB*, 509 F.2d 490 (D.C. Cir. 1974).

In applying the above law to the facts of this case, I am convinced that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint. Van Vlerah's promise of higher wages and benefits made while soliciting Reust to abandon his support for the Union, violated Section 8(a)(1) of the Act. *M. K. Morse Co*., 302 NLRB 924 (1991). Moreover, Van Vlerah's interrogation of Reust as to what the Union had ever done for him was designed to illicit the extent of Reust's union support and sympathies or lack thereof and coupled with a promise of increased pay and benefits if Reust rejected union representation also violated Section 8(a)(1) of the Act, since it reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. *Western Health Clinics*, 305 NLRB 400, 407 (1991).

C. *The dDischarge of Arden Reust*

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Arden Reust because he formed, joined, and assisted the Union and engaged in concerted activities, because the Respondent believed that he had done so, and to discourage membership in a labor organization.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate ''in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.'' Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries his burden of proving unlawful motivation, then the employer may avoid being held in violation of Section 8(a)(1) and (3) of the Act only if it can show that ''the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra at 1089. Also see *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991).[9] However, when an employer's motives for its actions are found to be false, the circumstance may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1960). The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer's actions were illegally motivated. *Associacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Service Co*., 285 NLRB 81 (1987); *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991). That finding may be based on the Board's review of the record as a whole. *ACTIV Industries*, 277 NLRB 356 (1985); *Heath International*, 196 NLRB 318 (1972).

In establishing a prima facie case of unlawful motivation as the first part of the *Wright Line* test, the General Counsel is required to prove not only that the employer knew of the employee's union activities or sympathies, but also that the timing of the alleged reprisals was proximate to the protected activities and that there was antiunion animus to ''link the factors of timing and knowledge to the improper motivation.'' *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991); *Service Employees Local 434-B*, 316 NLRB 1059 (1995).

In the case Van Vlerah learned of Reust's unwavering support of the Union when on September 21, 1993, he coercively interrogated Reust and offered Reust a substantial increase in pay and unspecified additional benefits if he would abandon the Union and help the Respondent go nonunion. Reust at that time defended the Union and rejected Van Vlerah's offer. Moreover, aside from the fact that the Respondent engaged in various violations of Section 8(a)(1) of

[9] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *T & J Trucking Co*., 316 NLRB 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

the Act, the record evidences other instances of antiunion animus on the part of Van Vlerah, i.e., Van Vlerah's statement to Reust about going nonunion after the incident with Plumbers Local 50 Business Agent Flowers, Van Vlerah's statements to Leonard La Bundy, JAC director of training, and Mark Richards, Plumbers Local 166 business manager, about working nonunion, all occurring in fairly close proximity to the Respondent's discharge of Arden Reust and establishes by a preponderance of the credible evidence that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the Respondent's decision to terminate Reust and was discriminatorily motivated. *Wright Line*, supra; *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

In order to rebut the General Counsel's prima facie case, the Respondent must show that it would have discharged Reust even in the absence of his union activities and support. The Respondent has the burden of presenting ''an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.'' *Equitable Gas Co*., 303 NLRB 925 (1991); *Chelsea Homes*, 298 NLRB 813 (1990).

The Respondent asserts that the reason for Reust's termination was his failure to meet the required deadline on the gas line tie-in and his failure to immediately notify the Respondent of the problem with the gas line leak for at least 2 days, leaving the Pioneer school in state code violation and resulting in additional costs to the Respondent for overtime and double time pay since the work on the Pioneer job now was required to be performed on a Saturday with a larger work crew and the Pioneer school board refused to reimburse the Respondent for these costs.

Despite this, Van Vlerah testified that Reust's discharge was a ''cumulative thing'' enumerating several other ''problems'' with Reust starting with his first year of employment, some occurring shortly before his termination, ''which cast a bad light about him in the eyes of Van Vlerah Mechanical.''[10] However, it is significant to note that Van Vlerah considered Reust to be a key employee, reliable and hard working and performing a good job most of the time until after Reust rejected his offer to abandon the Union and help the Respondent go nonunion. Moreover, Reust had never received any discipline for these ''problems'' prior to his rejection of Van Vlerah's offer of a substantial wage and benefit increase if Reust rejected the Union and assisted the Respondent in going nonunion, and Reust had been promoted to working foreman in May 1992 and given a company truck to take home, a sign of trust and confidence by the Respondent.

As to the main reason for the Respondent's discharge of Reust as alleged, that the Respondent terminated him because he failed to meet the tie-on deadline and to apprise the Respondent of the problems he was having on the Pioneer Job site with the gasline tie-in, the credible evidence shows that Reust actually did take appropriate steps to do so. On September 30, 1993, after taking action to discover where the leak was coming from, Reust gave Jacquay the defective meter fitting advising him of the problem he was experiencing at the Pioneer Job site with the tie-in pipe line and then told Karen Van Vlerah about this, with Karen Van Vlerah acknowledging that she understood the problem. This was proper procedure for reporting problems on jobsites.

While I admit that I found this to be a close question, I find that the strong prima facie case established by the General Counsel was not rebutted by the Respondent. In this connection the Respondent's burden is substantial. *EddyLeon Chocolate Co*., 301 NLRB 887 (1991). In view of all of the circumstances present in this case, the Respondent has not met its burden under *Wright Line* and therefore the discharge of Arden Reust violated Section 8(a)(1) and (3) of the Act. *T & J Trucking Co*., supra; *Prime Time Shuttle International*, 314 NLRB 838 (1994).

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent, set forth in section III above, occurring in connection with the Respondent's operations described in section I above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully terminated Arden Reust, the Respondent shall be ordered to offer him immediate reinstatement to his former position, discharging if necessary any replacement hired since his termination, and that he be made whole for any loss of earnings or other benefits by reason of the discrimination against him in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977); and *Isis Plumbing Co*., 138 NLRB 716 (1962).

Because of the nature of the unfair labor practices herein found, and in order to make effective the interdependent guarantee of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

[10] Van Vlerah characterized some of those ''problems'' as ''most likely not noteworthy of making written records of. Just piping practices that were wrong . . . blueprints that weren't followed. Things of that nature.'' As for Reust using the Respondent's gas in his own car, he had been allowed to do so on occasion but this was discontinued after Reust refused Van Vlerah's offer on September 21, 1993. In fact Van Vlerah admitted that Reust was not disciplined for unauthorized use of company materials. Moreover, Reust's ''blowing up a company truck that he was using appeared, according to Van Vlerah's own testimony, to be satisfactorily explained and attributable to Reust's hearing problem and Reust received no discipline for this incident. And the incident with the unsecured acetylene tanks, Reust received no discipline for the first violation but did receive a warning for a repetition of this safety violation after September 21, 1993, although the violation had been discovered prior to that date and could have led to fines against the Respondent.

CONCLUSIONS OF LAW

1. The Respondent, Van Vlerah Mechanical, Inc., is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Plumbers and Steamfitters Local Union No. 166, a/w United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, in violation of Section 8(a)(1) of the Act, has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act by interrogating its employees about their union membership, activities, and sympathies, by promising its employees that their wages and benefits would improve if the employees rejected the Union as their bargaining representative, by soliciting its employees to abandon their support for the Union, and by threatening its employees with discharge if they assisted their union in enforcing the collective-bargaining agreement.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by terminating employee Arden Reust because he joined, supported or assisted the Union and engaged in concerted activities, because the Respondent believed he had done so, and to discourage employees from engaging in these activities.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Van Vlerah Mechanical, Inc., Angola, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union membership, activities, and sympathies.

(b) Promising its employees improved wages and benefits if they rejected the Union as their bargaining representative.

(c) Soliciting its employees to abandon their support for the Union.

(d) Threatening its employees with discharge if they assisted their Union in enforcing the collective-bargaining agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employee Arden Reust immediate and full reinstatement to his former job or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed by him, and make him whole for any loss of earnings and other benefits suffered by him as a result of the discrimination against him in the manner set forth in the remedy section of this decision, and remove from the Respondent's personnel records any references to his termination and notify him, in writing, that this has been done and that evidence thereof will not be used as a basis for any future personnel action against him.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Angola, Indiana facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''